

1 UNITED STATES BANKRUPTCY COURT

2 SOUTHERN DISTRICT OF NEW YORK

3 Case No. 16-11700-SMB

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5 In the Matter of:

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7 GAWKER MEDIA, LLC

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9 Debtor.

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13 United States Bankruptcy Court

14 One Bowling Green

15 New York, NY 10004

16

17 July 17, 2018

18 10:22 AM

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21 B E F O R E :

22 HON STUART M. BERNSTEIN

23 U.S. BANKRUPTCY JUDGE

24

25 ECRO: UNKNOWN

1 HEARING re Sale Hearing

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25 Transcribed by: Sonya Ledanski Hyde

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1 P R O C E E D I N G S

2 MR. GALARDI: Good morning, Your Honor.

3 THE COURT: Good morning.

4 MR. GALARDI: For the record, Gregg Galardi on
5 behalf of the plan administrator. The only matter on the
6 agenda today for Gawker is the -- your -- our motion for
7 approval of a sale of the remaining what we call the Gawker
8 assets.

9 Your Honor, with respect to the sale of assets,
10 there are two people in the courtroom today that I'll --
11 unless Your Honor would want to proceed direct, I would end
12 up proffering their testimony?

13 THE COURT: Go ahead. Because there's a lot of
14 factual findings in your order that I don't have any
15 evidence to support.

16 MR. GALARDI: We'll take those up as you -- as we
17 go, Your Honor. But with respect to the actual evidence for
18 today's factual findings, one is I would refer Your Honor to
19 Docket Number 1150, which was the auction transcript that
20 was submitted to the Court. That is the transcript of the
21 specific auction that was held in our offices on the --

22 THE COURT: Well, for example, you have a finding
23 at Paragraph E about notice. How do I know that --

24 MR. GALARDI: Your Honor --

25 THE COURT: -- was the notice you gave?

1 MR. GALARDI: Your Honor --

2 THE COURT: There's no reference to the
3 certificates of service.

4 MR. GALARDI: And Your Honor, we would put in --
5 and I was going to ask Your Honor to take judicial notice of
6 two other docket numbers. One is Docket Number 1144, which
7 is notice of the service of the executory contracts and
8 Docket Number 1146 which is the notice of the sale hearing.

9 Your Honor, at Docket Number 1150 Your Honor also
10 has, and we did make reference to this, judicial notice can
11 be taken of the transcript of the bid procedures hearing,
12 which was held on June 20th, which also put forth notice.

13 THE COURT: But those are just a list of names.
14 How do I know, for example, that those are the people on the
15 2002 list? You know, you're asking me to make a specific
16 finding that you served all people who filed a notice of
17 appearance. If I just look at names, I don't know that to
18 be the case.

19 MR. GALARDI: Well, actually, I think it's more
20 broken down by that. And if we can -- again, Your Honor, if
21 the claims agent makes a representation that they served all
22 of the people and you correspond that to the 2002 list, I
23 have not gone back, quite honestly, to look at the
24 certificate of service, but I believe they break it down by
25 the kind of parties that they do and who they serve. And

1 that's the claims agent who is an agent of the court to
2 serve those people who are on the 2002 list. They do the
3 regular service, so that's why I give you the docket number,
4 it's 1144 and 1146, because those are the court approved
5 persons. I don't go back and check each one, but that's
6 their job --

7 THE COURT: But I should do that, huh?

8 MR. GALARDI: -- to service that. No, Your Honor,
9 but you shouldn't do it.

10 THE COURT: Okay.

11 MR. GALARDI: But certificates of service for a
12 claims agent who's hired as the arm of the bankruptcy court
13 to serve all purpose -- people on the 2002 list, who is
14 directed to do so, would send the notice to those persons on
15 the service list.

16 As to serving, also, the auction transcript, the
17 notice of designation of successful bidder, all of those are
18 the claims agent's job. And unless someone challenges that
19 they don't do the job, and you look at the names, they serve
20 the people on the 2002 list. If I need to bring the claims
21 agent in, we'll, you know, do that.

22 THE COURT: Why don't you just refer to the
23 certificates of service and say it's good and adequate
24 service?

25 MR. GALARDI: That's fine.

1 THE COURT: I'm not --

2 MR. GALARDI: That's fine.

3 THE COURT: -- suggesting --

4 MR. GALARDI: I understand, Your Honor.

5 THE COURT: I'm not suggesting that you didn't
6 make adequate service. All I'm saying is, if I looked at
7 the certificate of service I couldn't make the specific
8 findings that you have in here.

9 MR. GALARDI: That's fine. Your Honor, we can
10 modify that, if Your Honor's preference is to refer to the
11 certificate of services and that we believe that that is
12 good and adequate notice as we believe that it covered the
13 2002 list, interested parties, et cetera. We certainly can
14 make those modifications.

15 With respect to the sale itself, Your Honor, Your
16 Honor does have a transcript in front -- that has been
17 filed, which is the auction transcript.

18 THE COURT: I don't have that. All I -- I ran off
19 the -- what do you call it, the sale order that you sent,
20 but I didn't get the documents you filed yesterday.

21 MR. GALARDI: If I may approach, Your Honor?

22 THE COURT: Sure. Thanks.

23 MR. GALARDI: Your Honor, what I've handed up and
24 what was also filed, along with a number of other documents
25 last Friday with the notice of the designation which is the

1 Docket Number 1150, is the notice of the -- which is the
2 transcript of the actual auction that was conducted in our
3 offices.

4 THE COURT: Were there any other bidders?

5 MR. GALARDI: Yes, Your Honor.

6 THE COURT: How many bidders were there?

7 MR. GALARDI: Your Honor, there was the stalking
8 horse bidder, and as set forth in that auction transcript,
9 as Mr. Holden would testify, we received one bid prior to
10 the deadline on Monday of last week with respect to an
11 overbid. That bid was a qualifying overbid by the number
12 set forth in the bid procedures. That is by the BDG GMGI
13 Acquisition.

14 Then we received another bid on I think it was
15 Wednesday morning that was executed and deposit received by
16 a company called Online Logo Maker, LLC.

17 As required by the settlement with Mr. Bollea, we
18 consulted with Mr. Bollea about whether or not we should
19 accept that higher or otherwise bid and allow that person to
20 participate in the auction, despite the fact that it was a
21 bid that came in after the bid deadline. We also consulted
22 with -- although the administrator doesn't have to have
23 approval from, they -- we also consulted with our equity
24 holders and determined that in light of that bid satisfying
25 all the requirements, a deposit being put in, and it being a

1 bid that satisfied the qualified bid, and that the person
2 had the financial wherewithal, we decided to extend the
3 deadline and allow that person to participate in the
4 auction.

5 THE COURT: How much was the winning bid?

6 MR. GALARDI: The winning bid was, as reflected in
7 that, \$1.35 million.

8 THE COURT: And what was the stalking horse
9 contract?

10 MR. GALARDI: The stalking horse was, I think we
11 had two rounds of bids, so it was in the 1.035 range, I
12 believe is the number, Your Honor.

13 THE COURT: So you got another \$300,000?

14 MR. GALARDI: Three hundred minus -- we got
15 roughly two rounds of bids and we received about, after
16 paying off the break-up fee, about an 100, \$150,000 in bids.

17 Your Honor, so when we conducted the auction, we
18 had three bidders present at the auction in our offices,
19 reflected by the auction transcript. As a result of BDG
20 GMGI's acquisition being both timely and satisfying all the
21 requirements, we deemed that, and knowing more about its
22 financial wherewithal, we deemed that to be the highest and
23 best bid, as set forth in the auction transcript. And as Mr.
24 Holden would testify, we then set forth the rules of the
25 auction. That higher and better bid by BDG was also agreed

1 to by Mr. Bollea.

2 We then asked the questions whether the bidders
3 would agree, which the stalking horse had not agreed,
4 whether anyone would stand in place to be the back-up
5 bidder. All of the bidders agreed to be -- stand in place
6 with the back-up bidder. All of the bidders also agreed and
7 we set a closing date of August 2nd for the transaction.
8 And we set that the 2nd back-up bidder would then stay open
9 for a period of seven days following that as set forth in
10 the auction.

11 We then commenced the auction with the -- what we
12 deemed to be the lower bid at that point, the stalking horse
13 bidder. As reflected in that instance, the stalking horse
14 bidder did not make another bid. We had a two pass rule.
15 Then Online Logo Maker did make a bid. That was then
16 followed by a higher bid by BBG. The stalking horse didn't
17 bid and then everybody passed and that's how we arrived at
18 the number \$1.35 million. So two rounds of bidding followed
19 along with the initial overbid, so that's roughly \$150,000
20 or \$100,000 increase in the bid.

21 At the conclusion all the parties passed and we
22 announced that BBG GMGI, which was the timely overbid filed
23 on the Monday, was the highest and best bid and concluded
24 the auction.

25 With respect to BBGMI and with respect to Mr.

1 Holden's efforts, this was the culmination of efforts that
2 we would try to incorporate by reference to his testimony
3 and his proffer at the bid procedures hearing. But just a
4 quick summary, after going out to over 150 parties last --
5 in the last -- after the bid procedures hearing approved the
6 stalking horse bid, there was five to ten that were
7 interested, as I've just stated to the Court, ultimately two
8 incremental bids, three bidders at the auction, and the
9 auction was conducted. It was a rather short auction, but
10 it was conducted and no one had any objections.

11 The documents and the asset purchase agreements
12 were essentially identical on all terms. We spent some days
13 from Monday to the auction conforming the agreement of BDG
14 GMGI but it was not a material change, it was really how the
15 break-up fee would work for the payment.

16 With respect to BDG GMGI, Your Honor had asked
17 about this the last time, but we should put the following,
18 and Ms. Schwartz here is the CFO, and I'll put on a very
19 short proffer as to their adequate assurance.

20 THE COURT: Go ahead.

21 MR. GALARDI: BDG GMGI Acquisition is a subsidiary
22 of BDG Media, Inc. BDG Media, Inc.'s current valuation is
23 approximately or over \$195 million. It has cash on its
24 balance sheet of \$12 million. It has 240 employees. It has
25 strategic partners and venture capitalists invested in that,

1 including Time Warner, Sabine and others, and expects --
2 last year it had over \$45 million in revenues and expects to
3 have over \$75 million in revenues this year.

4 BDGI as a business is a digital content
5 corporation that owns websites and associated social media.
6 Its brands include Bustle, ROMPER, Elite Daily and The Zoe
7 Report. And its intentions with respect to Gawker are to do
8 a relaunch of it, but to do so with certain, you know,
9 editorial changes which will be in its discretion.

10 And that it -- and at this point, Your Honor, with
11 respect to adequate assurance, to fill in their financial
12 wherewithal to meet the contracts, Mr. Holden would testify
13 that approximately, currently the operations and those
14 contracts that are being assigned, not assumed, we did that
15 in the context of the plan, cost about \$100,000 a year to
16 operate, and there's maybe \$100,000 of maintenance. So we
17 have no objections. They were -- received notice of both
18 the bid, the auction, the successful bidder. We've not had
19 any contacts, we've had no objections from any parties. But
20 we believe that BDG Media and BDG GMGI Acquisition, the
21 actual acquiring entity, has the financial wherewithal, has
22 the experience and is more than able to perform the
23 contracts as they are assigned.

24 Your Honor, with respect to the business judgment,
25 Mr. Holden would testify that in his view, after having

1 solicited the bids, and as we talked a little bit about the
2 bids procedures hearing, he does believe that now is the
3 time to sell the assets of the company. We had discussed,
4 with Mr. Bollea, as Mr. Holden would testify, possibly
5 withdrawing the assets. You'll even see a reference to that
6 in the auction transcript. I will say that there are
7 certain equity holders that we had talked about who we --
8 the 55 percent of the contingent, who would have preferred
9 not to proceed with the sale. We did suggest to them if
10 they wanted to not proceed with the sale they can come up
11 with an economic arrangement to do so, to take it off, to
12 sort of backstop the price, because we were going to auction
13 and had the price. We have received no offers or further
14 objections in that regard, so we believed that -- so that at
15 this point, and Mr. Holden would testify, that in his
16 business judgment this is the proper time to sell the
17 assets.

18 He would also note that in the event that we chose
19 to withdraw the assets we would be probably in some
20 litigation with Mr. Bollea because Mr. Bollea also believes
21 that now is the time to sell the assets. We did approach
22 them about that, and there was relatively little interest in
23 proceeding, at that time, on another course.

24 So in Mr. Holden's judgment, and as Your Honor
25 knows under the plan Mr. Holden is the plan administrator

1 with the authority to sell these assets, and after
2 consulting with those people who have an economic interest,
3 and offering those people who have an economic interest to
4 backstop what would have been walking away from a
5 transaction, not receiving that, having no objections, and
6 having no formal objections filed, Mr. Holden would request,
7 and believes it's in the best interest of these cases, to
8 sell these assets.

9 This is the last asset of the case. It will also
10 allow us to close up the case in a timely fashion and
11 believes that it's in the best interest to do so.

12 With respect to any relationships between BDG and
13 Gawker or the plan administrator or formal -- former members
14 of the board of directors, Mr. Holden would also testify
15 that there are no relationships with any of the former.
16 They are not insiders, none of the acquirers are insiders.
17 There has been no interest, there has been no attempt, that
18 we are aware of, to at all impede or otherwise collude to
19 keep the price of the bid lower. The auction, I think, also
20 reflects that there was an auction, a market check on these,
21 and we just simply didn't get as much as we might otherwise
22 have liked.

23 Ms. Schwartz would also, if called to testify,
24 would also testify that none of the BDG acquisition or any
25 of the BDG Media persons are insiders or affiliated with any

1 of the Gawker entities. Indeed they were in existence prior
2 to --

3 THE COURT: Or the plan administrator, I assume?

4 MR. GALARDI: Or the plan administrator, correct,
5 Your Honor. So there is no insider transactions.

6 Ms. -- they would also testify, and Mr. Holden
7 would testify, and I know this goes to findings, that all of
8 the bidders have made proposals that had to be free and
9 clear of any liens, claims and encumbrances. Right now we
10 don't know of claims and encumbrances because all of these
11 are unsecured assets, but they are taking free and clear.

12 Another aspect of both of the transactions, Mr.
13 Holden would testify, and why we think this sale is in the
14 best --

15 THE COURT: Is that why you had the phrase "free
16 and clear" nine times in the order?

17 MR. GALARDI: People were concerned about it, and
18 that's probably why it's nine times --

19 THE COURT: Well, I --

20 MR. GALARDI: -- in the order.

21 THE COURT: -- crossed out the next eight, once I
22 read it once.

23 MR. GALARDI: Excuse me?

24 THE COURT: I will cross out the next eight times.

25 MR. GALARDI: I understood that, and I looked at

1 it and I had -- well, there's the findings and there's the
2 order, so I'd ask you to wait till after the second one.
3 But, Your Honor, I understand.

4 With respect to -- oh, and one other aspect of
5 this which believes Mr. Holden would testify why it's in the
6 best interest of the company to close the sale at this time
7 is that all of the bidders agreed to an archive agreement
8 whereby the archives could remain. We are going to enter
9 into an archive agreement so that the Gawker archives are
10 available.

11 I would also note that there was some concern
12 about taking down articles and concerns, that's why we were
13 concerned about that. We did provide notice -- some of our
14 equity members mentioned that they were concerned about it,
15 we did provide notice, and I specifically reached out to
16 counsel, who you're aware of, with the employees and the
17 writers to say, if you have concerns about this, we cannot
18 be the safeguard of the articles any longer, it's going to
19 new hands. They appreciated that, but took no action. We
20 have no objections. They understand that that is a risk,
21 although we hope, and one of the reasons we protected the
22 archives, that the articles main up, is that they will still
23 have access to that information on the Internet.

24 I don't know if Your Honor has other questions or
25 wants to go through the order and --

1 THE COURT: Well, we'll go through the order in a
2 minute. Let me ask if anyone wants to, first of all object
3 to what is essentially a proffer of Mr. Holden's testimony
4 and Ms. -- is it Ms. Schwartz -- Ms. Schwartz's testimony,
5 or wants to cross examine either witness? Hearing no
6 response, I'll accept the proffer as the evidence at the
7 hearing.

8 Does anybody want to be heard with respect to the
9 transaction or any other matter relating to the transaction?

10 MR. GALARDI: And Your Honor, just to give a
11 precise number, and Mr. Tabak was nice enough to pull it
12 out, the precise number of the stalking horse bid was
13 \$1,131,600 and there was \$150 million of bid protection but
14 the bids went through.

15 MAN: Slightly less.

16 THE COURT: One hundred and fifty thousand, I
17 assume.

18 MR. GALARDI: A -- yes, \$150,000 total break-up
19 fee (indiscernible).

20 THE COURT: All right. Thank you. Does anybody
21 else want to be heard?

22 All right. I'll approve the transaction. I'm
23 familiar with the marketing efforts which were set -- which
24 have been set out on the record, both in litigation and in
25 connection with the sale motion and the issues that arose in

1 connection with the marketing efforts. So I'm satisfied
2 that the marketing was adequate. And since this was a
3 competitive auction, this is the best evidence of what a
4 fair and reasonable price is. So I'll approve the
5 transaction.

6 I think, Mr. Galardi, that your order is
7 unnecessarily long. And the longer it is, the longer it
8 will take me to go through it, because I read every word and
9 I cross out a lot.

10 I think the evidentiary findings that you want are
11 set forth in our form order that we have online, which are
12 sufficient.

13 If the contract, which I'm approving provides for
14 somebody to do something, you don't have to put it in the
15 order. I'm approving the contract and I'm authorizing the
16 plan administrator to perform the contract, and that's all
17 you really need.

18 There's a lot of -- there's several findings here
19 relating to the compelling circumstances of the sale. I
20 don't know why you need this. This was an adequately
21 noticed sale, it's a post-confirmation sale.

22 I don't think there are any Lionel issues. All I
23 really have to decide, based on the evidence, is that it's
24 an appropriate exercise of business judgment to sell the
25 asset to the buyer. And for the reasons that you've

1 articulated, and I've accepted as part of the record, that's
2 sufficient.

3 With respect to your "free and clear" language, I
4 have two comments. First of all, does anybody else have an
5 interest in these assets? I know that Mr. Bollea has an
6 interest in the income stream, I don't know if that's an
7 assignment or an equitable interest or what. But who else
8 has an interest in these assets?

9 MR. GALARDI: Your Honor, there may be parties who
10 have asserted, over time, some interest. For example,
11 copywrite people, and we -- they've been noticed. So they
12 may say, oh, well this is a copyrighted photo or something
13 like that.

14 So it's that kind of concern where people seem to
15 come out of the woodwork in these cases, that is why it's
16 necessary to protect those kinds of interests. They've been
17 noticed, they've been watching the Gawker case, they've
18 reached out to us. So we think we do need that language.

19 THE COURT: All right. You have a free and clear
20 provision for the assignment of the contracts. But there's
21 no free and clear provision in Section 365. Where does that
22 come from?

23 MR. GALARDI: Your Honor, but again, it's also a
24 sale of a contract. So to the extent it's a sale --

25 THE COURT: So what's the difference between an

1 assignment and a sale? That's one I pondered for many
2 years, since I read that decision, I forget the case, but --

3 MR. GALARDI: Well, I mean, an assignment can just
4 be an assignment without cash, without consideration. You
5 could assign rights under a contract, you can also buy the
6 right and assign it to them. So I think that there are
7 differences. I'm not -- you know, metaphysically at this
8 point I'm not going to say much more than that.

9 THE COURT: Well --

10 MR. GALARDI: But I have seen cases, for example,
11 when you have leases where people have rights on mortgages
12 that you want to both sell and assign those rights so that
13 you can get it free and clear of that mortgage. And I've
14 seen mortgagees object on those grounds.

15 So that's they that kind of language is usually in
16 there. You do two things with contracts.

17 THE COURT: Okay. I never thought of a mortgage
18 as an executory contract, but --

19 MR. GALARDI: No, but it can be a lien on a
20 contract, right? You can have rights as a mortgagee, and if
21 you want to sell a lease --

22 THE COURT: Oh, I see.

23 MR. GALARDI: -- subject to or free and clear of
24 that, you can try to sell free and clear of that.

25 THE COURT: I question whether you can do that,

1 but --

2 MR. GALARDI: I understand you question it. I've
3 seen people do it and I've seen disputes about it through my
4 years.

5 THE COURT: All right. Again, the sale is
6 approved for the reasons I've stated. I would suggest you
7 come back with a more concise order.

8 MR. GALARDI: We will do so, obviously, Your
9 Honor. It's also --

10 THE COURT: I will -- you know, I will read
11 whatever you give me --

12 MR. GALARDI: I know you will.

13 THE COURT: -- it just takes longer to read a long
14 (indiscernible) redundant order.

15 MR. GALARDI: We will try to shorten it and work
16 with the buyer --

17 THE COURT: Okay. I think you --

18 MR. GALARDI: -- and the back-up bidder for that,
19 Your Honor.

20 THE COURT: -- ought to go back to our proposed
21 orders which are in our guidelines.

22 MR. GALARDI: That's fine, Your Honor. We will
23 start --

24 THE COURT: All right. Thank you --

25 MR. GALARDI: -- there, but I appreciate it.

1 THE COURT: -- very much. Good luck.

2 MR. GALARDI: Thank you. Thank you.

3 (Whereupon these proceedings were concluded at 10:45 AM)

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I N D E X

RULINGS

	Page	Line
Sale transaction	22	5

C E R T I F I C A T I O N

I, Sonya Ledanski Hyde, certified that the foregoing
transcript is a true and accurate record of the proceedings.

Sonya

Ledanski Hyde

Digitally signed by Sonya Ledanski
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